90-1044

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEWELL PLASTICS, INC.,
Petitioner,

v.

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY

(Caption Continued on Inside Cover)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. RIKARD, ESQ.
PARKER, POE, THOMPSON, GAGE & PRESTON
2600 Charlotte Plaza
Charlotte, NC 28244
(704) 372-9000

ROBERT L. HOEGLE, ESQ.
Counsel of Record
PETER ARON, ESQ.
OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10171
(212) 207-1800

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

of Nashville, Inc.; Coca-Cola Bottling Company of Roanoke, Inc.; Coca-Cola Bottling Company of Wilson, Inc.; Coca-Cola Bottling Company United, Inc.; Coca-Cola Bottling Works of Tullahoma, Inc.; Columbia Coca-Cola Bottling Company; Columbus Coca-Cola Bottling Company; Dorchester Coca-Cola Bottling Company; Durham Coca-Cola Bottling Company, Inc.; Eastern Carolina Coca-Cola Bottling Company, Inc.; Fayetteville Coca-Cola Bottling Company; Hampton Bottling Works, Inc.; Lincolnton Coca-Cola Bottling Co., Inc.; Mid South Coca-Cola Bottling Company; Orangeburg Coca-Cola Bottling Co., Inc.; Plymouth Coca-Cola Bottling Co., Inc.; Rock Hill Coca-Cola Bottling Co.; Roddy Manufacturing Company; Sanford Coca-Cola Bottling Company; Tarboro Coca-Cola Bottling Company, Inc.; The Atlanta Coca-Cola Bottling Company; The Coastal Coca-Cola Bottling Company; The Coca-Cola Bottling Company of Henderson, Inc.; The Coca-Cola Bottling Company of Johnson City, Tennessee; and Wilmington Coca-Cola Bottling Works, Inc.,

Respondents.

QUESTION PRESENTED FOR REVIEW

This Petition presents a fundamental antitrust question on joint *buying* conduct, which respectfully would call upon this Court to determine whether buyers are subject to the same antitrust proscriptions against horizontal price-fixing and boycott agreements as sellers:

> Under Sherman Act § 1 (and corollary Clayton Act § 3 principles), is it permissible for a joint buying agreement to require that each participant deal exclusively with one designated supplier and pay the price fixed by the group, excluding all other suppliers from competing for individual participants' business?

This question subsumes a number of closely related issues on joint buying conduct, similarly turning on whether the ground rules are the same for buyers and sellers:

a. Do *per se* rules apply?

b. Do resulting lower prices evidence *anti*-competitive or *pro*-competitive effects?

c. Is "market power" a prerequisite for *per se* or Rule of Reason liability, and if so, is it satisfied where a group of over two dozen buyers, which come to represent nearly *40%* of the relevant buying market, agree that the group may set—and hence has the power to raise or lower—the price each must pay?

d. Does a supplier suffer "antitrust injury" where it loses profits as a result of an exclusive dealing and price-fixing agreement between a competing supplier and a group of customers?

e. Where a horizontal agreement *on its face* has anti-competitive provisions, may the district court nonetheless find—as a matter of law—that the agreement has no anti-competitive effects and is reasonable, and therefore on summary judgment, dismiss Sherman Act § 1 and Clayton Act § 3 claims challenging it?

LIST OF PARTIES

The parties are identified in the caption. Petitioner Sewell Plastics, Inc. is a subsidiary of Constar International, Inc. and has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ———

SEWELL PLASTICS, INC.,
Petitioner,

v.

THE COCA-COLA COMPANY (doing business through its division, COCA-COLA USA); SOUTHEASTERN CONTAINER, INC.; ABERDEEN COCA-COLA BOTTLING CO., INC.; ALABAMA COCA-COLA BOTTLING COMPANY; BISCOE COCA-COLA BOTTLING COMPANY, INC.; CAROLINA COCA-COLA BOTTLING CO., INC.; COCA-COLA BOTTLING COMPANY CONSOLIDATED; COCA-COLA BOTTLING COMPANY OF ANDERSON, SOUTH CAROLINA, INC.; COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N.C.; COCA-COLA BOTTLING COMPANY OF MOBILE; COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.; COCA-COLA BOTTLING COMPANY OF ROANOKE, INC.; COCA-COLA BOTTLING COMPANY OF WILSON, INC.; COCA-COLA BOTTLING COMPANY UNITED, INC.; COCA-COLA BOTTLING WORKS OF TULLAHOMA, INC.; COLUMBIA COCA-COLA BOTTLING COMPANY; COLUMBUS COCA-COLA BOTTLING COMPANY; DORCHESTER COCA-COLA BOTTLING COMPANY; DURHAM COCA-COLA BOTTLING COMPANY, INC.; EASTERN CAROLINA COCA-COLA BOTTLING COMPANY, INC.; FAYETTEVILLE COCA-COLA BOTTLING COMPANY; HAMPTON BOTTLING WORKS, INC.; LINCOLNTON COCA-COLA BOTTLING CO., INC.; MID SOUTH COCA-COLA BOTTLING COMPANY; ORANGEBURG COCA-COLA BOTTLING CO., INC.; PLYMOUTH COCA-COLA BOTTLING CO., INC.; ROCK HILL COCA-COLA BOTTLING CO.; RODDY MANUFACTURING COMPANY; SAN-

FORD COCA-COLA BOTTLING COMPANY; TARBORO COCA-COLA BOTTLING COMPANY, INC.; THE ATLANTA COCA-COLA BOTTLING COMPANY; THE COASTAL COCA-COLA BOTTLING COMPANY; THE COCA-COLA BOTTLING COMPANY OF HENDERSON, INC.; THE COCA-COLA BOTTLING COMPANY OF JOHNSON CITY, TENNESSEE; and WILMINGTON COCA-COLA BOTTLING WORKS, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The district court's opinion granting summary judgment to defendants (respondents herein) on Petitioner Sewell Plastics, Inc.'s ("Sewell's") *per se* claims is published as *Sewell Plastics, Inc. v. The Coca-Cola Co.*, 720 F. Supp. 1186 (W.D.N.C. 1988). The district court's opinion granting summary judgment to defendants on Sewell's remaining claims is published as *Sewell Plastics, Inc. v. The Coca-Cola Co.*, 720 F. Supp. 1196 (W.D.N.C. 1989). The *per curiam* opinion, filed September 4, 1990, by the Fourth Circuit Court of Appeals affirming the district court's opinions is unpublished. The district court's order, filed March 3, 1989, excluding evidence of federal price-fixing convictions of certain defendant bottlers is also unpublished.

JURISDICTION

The unpublished *per curiam* opinion of the Court of Appeals for the Fourth Circuit was entered on September 4, 1990. (App. 1a.)* A timely Petition for Rehearing

---

* "App." refers to the Appendix hereto. "Record" herein refers to the Joint Appendix submitted on the Fourth Circuit appeal.

and Suggestion for Rehearing In Banc was filed, which was denied on October 2, 1990. (App. 9a.) This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sherman Act § 1, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Clayton Act § 3, 15 U.S.C. § 14, provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale on such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Clayton Act § 4, 15 U.S.C. § 15(a), provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . .

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interroga-

tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

A supplier is prevented from competing for the business of more than two dozen former customers because they have jointly agreed to form their own "cooperative" supplier, from which each agrees to buy almost all of its requirements (at least 80%) for the next five years. Each also agrees to pay the uniform price set by the group, regardless of whether a competing supplier offers a significantly lower price. Consequently, no single independent supplier can compete for this business, regardless of price or other consideration. The cooperative creates—in the words of its own management—a "high volume *captive* market," which in fact comes to foreclose from competition nearly 40% of the relevant market.

The excluded supplier charged that the joint buying agreement, *inter alia*, violates Sherman Act § 1 and Clayton Act § 3. On summary judgment, the district court initially dismissed the supplier's *per se* claims and directed that the remaining claims proceed to trial for jury determination under the Rule of Reason. On the eve of trial, the district court *sua sponte* reconsidered its prior ruling made 10 months' earlier, and on the first day of trial granted respondents' oral motion dismissing all remaining claims. The Fourth Circuit Court of Appeals affirmed.

Dismissal of the supplier's claims as a matter of law means that buyers are no longer subject to Sherman Act § 1 and Clayton § 3 proscriptions against concerted conduct, including price-fixing and boycott activities. This case, therefore, presents occasion for considering and determining whether, and to what extent, the antitrust laws apply evenly to buyers and sellers alike.

The Facts

The Parties

Sewell makes plastic beverage bottles for sale to soft drink bottlers. It was one of the first suppliers upon the industry's inception in 1977 and now sells bottles throughout most of the country. For several years before the challenged joint buying agreement was put in place, Sewell was the principal supplier to the respondent bottling companies, supplying the vast majority of their needs. (App. 31a-33a.)

Respondent The Coca-Cola Company is, of course, the well known soft drink company, making and selling syrup and related products to its franchised bottlers, including the respondent Coca-Cola bottlers, all of which are located in the southeastern United States. They sell Coca-Cola and certain other brands to retailers located within their exclusive territorial franchises. (App. 15a.)[1]

Respondent Southeastern Container, Inc. ("Southeastern") is a "cooperative" manufacturer of plastic bottles located in Asheville, North Carolina. (App. 15a.)[2] It was formed in 1982 by over two dozen of the respondent bottlers, with others joining since then. Each is a stockholder of Southeastern. Separately, the bottlers also jointly agreed that each would enter into an identical five-year requirements contract to buy from Southeastern, in effect making all of them captive customers of Southeastern. (App. 36a.)

---

[1] The Soft Drink Interbrand Competition Act of 1980, 15 U.S.C. §§ 3501-3503, expressly provides for the enforceability of soft drink exclusive territorial franchises where substantial interbrand competition exists, thereby exempting those agreements from antitrust attack. The Act also expressly provides that no other antitrust exemption is afforded. 15 U.S.C. § 3502.

[2] The cooperative was not formed under any legislation authorizing particular cooperatives (as, for example, agricultural cooperatives authorized by The Capper-Volstead Act, 7 U.S.C. § 291 (1980)).

The form of the bottlers' joint venture itself, of course, provides no antitrust exemption or immunity for concerted conduct.

The Industry

The relevant market is the purchase and sale of plastic soft drink beverage bottles in a six-state area within the southeastern United States. (App. 30a.) From inception of the industry in 1977 until the joint buying agreement was implemented in 1982, there was increasing competition among several suppliers—including Sewell—for individual bottlers' business. Although bottlers typically signed supply contracts until at least the early 1980's, competition among suppliers was ongoing because the contracts almost always contained "price competition" clauses, permitting a bottler to buy elsewhere if its existing supplier did not meet a lower price offer. (Record 1972-75, 1987-90, 2028-57.) Suppliers also provided different services and related products—such as labels and package types—to satisfy individual bottler needs. (Record 1954, 1956, 1960, 1977-78; *see, e.g.*, 3462-63, 3471-72, 3482-83, 3903, 3910.)

By the early 1980's, competition among suppliers was very real, as the number of suppliers increased and the industry experienced oversupply. Industry prices generally began to decline by about mid-1980. By 1982, the industry was known to have excess capacity, and price competition continued to intensify. (App. 34a; Record 1908, 2178-79, 2497-98, 3893-4869.)[3]

Despite vigorous competition, Sewell continued to win most competitive battles, at least as to the respondent Coca-Cola bottlers, obtaining the vast majority of their business. (App. 32a-34a.)

---

[3] Notably, one of the competitors in the southeastern area was a Pepsi bottler "cooperative," "Carolina Canners," formed in the late 1970's and located in Cheraw, South Carolina. Although a cooperative, it sold bottles in competition with other suppliers—without need or benefit of the kind of joint buying agreement at issue here. Nonetheless, it has remained a viable supplier. (Record 1891, 1970-71, 1986, 3902, 4042.)

The Joint Buying Agreement

In 1982, a group of respondent bottlers sought to negotiate lower prices with suppliers by joining together to use their combined economic power. Dissatisfied, and with the encouragement and assistance of The Coca-Cola Company, they turned to the formation of Southeastern.

Evidently modeled after another Coca-Cola bottler cooperative located elsewhere (in Texas), Southeastern was formed only after the original 26-bottler group agreed in advance—*i.e.*, before Southeastern made its first bottle—that each would enter into a mandatory long-term supply contract. They jointly agreed that for a *five-year period*:

—each would buy at least 80% of its requirements from Southeastern;

—each would take the type of bottle ("1-piece") chosen collectively by the group (despite historically buying the other "2-piece" type);

—Southeastern would not have to provide related products (*e.g.*, labels) which independent suppliers offered in a freely competitive market; and

—each would buy at whatever price Southeastern's board of directors determined. (App. 36a-37a; Record 2573-74, 3112-16, 3334-35.)

The contract also included a "price competition" clause that was anything but that: for the first year, each bottler had to buy at the price set by the Southeastern board; thereafter, in order to buy from another supplier a bottler had to show that the average price of *two* independent suppliers was lower than Southeastern's, whereupon Southeastern still had 90 days to meet the average (*i.e.*, not even the lowest) price. *The consultant to Southeastern admitted that this was intended to prevent a single competitor from offering lower prices.* It was effective in doing so. (App. 38a.)

Even years *after* start-up, the same provisions were used in jointly agreed-upon supply contracts for subsequent products (new bottle sizes) made by Southeastern. (Record 3730-46.)

Market Effects

The most direct and obvious effect of the joint buying agreement was the removal of the Coca-Cola bottlers from the competitive market—where previously there had been vigorous competition for the respondent bottlers' business, there came to be none. (Record 2159, 2830, 2854, 3337-38, 3412-15, 5990.) Independent suppliers, like Sewell, were unable to compete for the vast majority of the bottlers' business, regardless of price. They had the opportunity to supply only when, for whatever reason, Southeastern was unable to meet bottler needs. Independent suppliers were thus forced to re-examine their commitment to the business, prompting them, for example, to curtail operations and to reduce research and development activities; and two suppliers decided to sell their operations and get out of the business. (App. 44a, 49a; Record 1955-57, 2061-65, 2273, 2306, 3578, 6810.)

After the joint buying agreement was put in place, bottle prices generally continued to decline. By its nature, the agreement would contribute to declining prices in two respects:

—it relegated existing suppliers to a much smaller market segment in which to compete, further intensifying price competition among them in that remaining competitive segment; and

—Southeastern itself, assured of a captive market and also not required to supply the complete mix of products and services offered by independent suppliers, could maximize its own efficiencies and hence offer lower prices.

Still, there was evidence that three bottlers sought to withdraw from the agreement. (*See* App. 37a-38a.) One was a relatively small bottler (Anderson) who in 1983

had been offered a *lower* price by Sewell. After being summoned to a Southeastern board of directors' meeting at which its obligations to the group were made unmistakably clear, it remained. The other two were among the larger bottlers. The Asheville bottler had concluded, as an independent consultant's written report stated, that it was losing market share by using the Southeastern-type bottle and should resume buying from independent suppliers. The other large bottler (Coke United) also wanted out, as reflected in handwritten notes of its chief financial officer prepared for a Southeastern board meeting, which stated "*we want out altogether.*" (Record 2937-38, 2941, 3612-13, 5631, 5709-11, 5746, 5832-33.)

Those two bottlers were told that if they withdrew, a financial assessment would be imposed by the group which, Southeastern's general manager conceded, significantly exceeded any actual losses it might suffer. (Record 1961-62, 2488-93, 2511-14, 2529, 2966-71, 3289-92, 5702-34, 6098.)[4]

Bottlers required to buy from Southeastern experienced quality problems with their bottles. (App. 45a.) Given the possibility of injury from exploding bottles, one bottler's personnel pleaded for permission to buy from Sewell because Southeastern's bottle was "exploding in our warehouse, on the trucks, in outlets and in people's homes." (Record 3670.) The request was denied. Coca-Cola's field personnel reported to headquarters that Southeastern experienced "a lot of failures, and/or quality problems which seem to be related to the fact that the bottler is almost

---

[4] On summary judgment, the district court interpreted these events as reflecting merely those bottlers' "consideration" of withdrawal, and found that the threatened financial assessment did not represent a penalty but rather "liquidated damages"—although no one testified to that effect and the agreement contained no "liquidated damages" provision. (App. 37a-38a.) In any event, even the district court's characterization shows that the bottlers were influenced by the agreement to refrain from further pursuing their options on the open market.

required to take anything that is delivered." (Record 5003R.)

"A High Volume Captive Market"

The group recognized that Southeastern's commercial "success" resulted directly from the joint buying agreement. In a slide presentation proclaiming Southeastern's success to the participating bottlers, Southeastern management asked, "Why can't merchant suppliers do the same?" The first reason: "They don't have the high volume captive market that Southeastern does with its sales agreements with our owners." (Record 3684-92.)

By the close of discovery in this action, the buying group's total purchasing power represented nearly 40% of the market. (App. 46a.)

Prior Proceedings

The prior proceedings were marked by unusual summary judgment procedures—involving conflicting written opinions; impromptu hearings; dismissal of the case from the bench (the district court remarking that it would have let the jury hear the case if it would only be a 2-3 day trial); and issuance of a lengthy opinion five months later where the district court characterized and weighed all evidence in the movants' favor. On appeal, the Fourth Circuit, in an unpublished *per curiam* opinion, affirmed with little discussion. These prior proceedings compel Sewell to respectfully suggest that *de novo* scrutiny of the evidence and question presented to this Court is especially appropriate now.

Summary Judgment I

Sewell filed its complaint in the Western District of North Carolina on August 4, 1986. The action was brought pursuant to Clayton Act § 4, charging violations of Sherman Act §§ 1 and 2, Clayton Act §§ 3 and 7, and state unfair trade laws. Respondents filed answers, and Southeastern subsequently added a counterclaim for abuse of process, unfair trade practices and interference with contractual relations, all arising either out of the filing

of this suit or Sewell's settlement with one of the respondent bottlers (Wilmington).

After considerable discovery, defendants made an omnibus motion for summary judgment on August 22, 1987. Sewell cross-moved for summary judgment for a declaration that the agreement—in its price-fixing and five-year 80% requirements elements—constituted a *per se* violation.

In his first summary judgment opinion issued on May 6, 1988, the Honorable James B. McMillan denied Sewell's cross-motion and granted respondents' motion dismissing Sewell's *per se* claims for a number of stated reasons, including: the fact that the bottlers were not competitors on the selling side [5]; the fact that the challenged restraints related to their joint production venture; and the fact that the courts were unfamiliar with the arrangement in issue. (App. 78a, 84a-93a.)

On the remaining claims, summary judgment was denied, the court expressly stating, *inter alia*, that there was sufficient evidence of anti-competitive effects to warrant trial under the Rule of Reason. (App. 91a, 93a-94a.) [6]

As the case headed toward trial, four more hearings were held.[7] The sufficiency of Sewell's evidence to pro-

---

[5] The court did observe that *if* the bottlers were competitors on the selling side, a *per se* finding may be warranted. (App. 92a.)

[6] The district court granted respondents' application for leave to file an interlocutory appeal from denial of summary judgment, which the Fourth Circuit denied. (App. 103a, 101a.)

[7] In the last hearing, the court ruled inadmissible Sewell's proffered evidence of two federal criminal price-fixing convictions, arising out of retail price-fixing by two defendant bottlers (who represented roughly 30% of the original buying group's purchases.) This was proferred to show that (a) there did not exist the supposedly vigorous interbrand competition between the Coca-Cola bottlers and their competitors which respondents had asserted as a motivation for entering into the agreement; (b) the Asheville bottler (whose two officers were convicted) was losing market share by using the type of bottle disfavored by consumers, and *not* because of any price competition from competing soft drink bottlers, as it

ceed to trial, as previously determined on summary judgment, was not questioned by the court in any of the hearings.

Summary Judgment II

In March 1989, within a week of the scheduled six-week jury trial, the district court issued a one-day notice for *sua sponte* reconsideration of the summary judgment motion denied in its opinion of 10 months earlier. The motion was denied without prejudice to renewal. It was again reheard impromptu after jury selection the following day and denied without prejudice, the court indicating that it intended to rehear it again following the second day of trial. On the first day of trial, the motion was made orally after opening statements and granted following the luncheon recess. (App. 106a-107a.)

In dismissing Sewell's claims from the bench, the court relied almost exclusively on the fact that bottle prices had declined since the joint buying agreement was implemented, which the court held could "only" have resulted from the joint buying agreement and which undoubtedly benefitted consumers. It remarked that if the case could have been tried in 2 or 3 days, the court would have let the jury decide it. (App. 107a.) The court indicated that it intended to make a number of additional findings, directing respondents to submit "proposed" findings and Sewell to respond. (App. 106a-107a.)

Five months later, on August 25, 1989, the court issued its lengthy opinion. (App. 11a.) After disposing of Sewell's argument that an unfair summary judgment

---

had asserted; and (c) there was an absence of the substantial interbrand competition which is a prerequisite for the antitrust exemption conferred by The Soft Drink Interbrand Competition Act of 1980.

The evidence was ruled inadmissible (on stated grounds that it involved only two defendants and would tend to prejudice the rest) and consequently was not considered later on reconsideration of summary judgment. (App. 98a.)

procedure was imposed on the eve of trial, the court reiterated the correctness of its prior dismissal. It relied on general industry price decline and output increase as confirming the absence of substantial anti-competitive effects. The court also ostensibly addressed other evidence of anti-competitive effects proffered by Sewell, systematically rejecting it as either irrelevant or insufficient, and otherwise disregarded Sewell's evidence entirely. To illustrate:

—on injury to the competitive process, the opinion disregards the most elemental fact that where once ongoing competition existed in 100% of the market, a significant portion (reaching nearly 40%) had been entirely foreclosed;

—injury to individual competitors (such as plant closings) was rejected as not evidencing "injury to competition" (App. 44a, 56a-57a);

—as to reduction of consumer choice, the consumers' acknowledged preference for the type of bottle made by independent suppliers was held insufficient because the consumers still purchased Coca-Cola products in the disfavored packages (App. 45a)[8];

—the severe quality problems suffered by Southeastern customers were held insufficient even to raise an issue of whether "overall" quality had deteriorated (App. 45a);

—cutbacks in research and development by some suppliers were held insufficient to raise an issue of

[8] The court evidently gave no weight to the consultant's report for Asheville, which concluded that Asheville's customers were buying less *because* it was using the type of bottle required under the joint buying agreement. (Record 5631.) The consumer in any event *had no choice* if he wanted to drink Coca-Cola products, since he could *only* obtain his product through the *exclusive* franchisee, which was using the disfavored package.

whether "overall" industry research and development declined (App. 44a); and

—foreclosure of nearly 40% of the market did not raise an issue of "market power," nor did the contractual right of the group to raise or lower prices to its bottlers (which they *must* pay). (App. 46a.)

No weight was accorded to four affidavits explaining how *other* suppliers (*i.e.*, not just Sewell) were unable to compete. The group's own admission that it possessed a "high volume captive market" which was responsible for its success, also was not addressed.

The district court also went on to hold that, even if there were anti-competitive effects, the challenged restraints were "reasonable" as a matter of law, outweighing any anti-competitive effects. As a matter of law, it was "reasonable" to employ such provisions to preclude an independent supplier from soliciting away one or more bottlers through lower price offers as that would "disrupt" Southeastern's operation.[9] As a matter of law, it was also "reasonable" to mandate a large volume commitment despite acknowledged evidence that far less volume was required to establish a viable manufacturing capability. (App. 58a-62a.)

The district court also held that Sewell had not suffered "antitrust injury" because it was really complaining about lost profits from competition from Southeastern and so its claims are barred under this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). (App. 63a-66a.)

The Fourth Circuit Court of Appeals affirmed, expressly approving the reasoning of the district court. (App. 1a.) Sewell's Petition For Rehearing and Suggestion for Rehearing In Banc was denied on October 2, 1990. (App. 9a.)

---

[9] Sewell respectfully submits that one man's "disruption" is another man's competition.

WHY CERTIORARI SHOULD BE GRANTED

Buyers and Sellers Alike Need to Know What the Antitrust Rules for Concerted Conduct Are, and Whether the Rules Are the Same for Both.

Joint buying arrangements are commonplace in many industries, including, for example, through purchasing cooperatives, as this Court acknowledged in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985). Typically the arrangement offers a voluntary alternative way for buyer and seller to do business, without eliminating or restricting the rights of buyers and sellers to do business individually. This case calls into question whether such arrangements may expressly exclude competition—through horizontal boycott (*i.e.*, exclusive dealing) and price-fixing agreement—in the name of seeking lower prices or other perceived benefits to the buyers. Stated bluntly, may buyers do to sellers, what sellers cannot do to buyers?

Antitrust proscriptions against concerted *seller* price-fixing and boycott activities seem firmly established. *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (November 26, 1990); *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (January 22, 1990). Under the Fourth Circuit's ruling here, however, the same proscriptions do not apply to *buyers;* or at a minimum, whether they do (and if so, how) is uncertain and confusing.

This Petition, therefore, should be granted to make clear whether the antitrust laws still apply to buyers as they do to sellers. More than 30 years have passed since this Court last condemned buyer price-fixing as *per se* unlawful, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), and pronounced that *any* concerted refusal by "traders to deal with other traders" likewise is *per se* unlawful. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). Less than two months ago, in *Palmer, supra*, this Court—hold-

ing unlawful sellers' market division—reiterated the blanket condemnation of *all* price-fixing agreements, relying on *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), in which a *buying* program was held unlawful.

Yet it now seems—at least by virtue of the Fourth Circuit ruling here—that joint buyer conduct ostensibly intended to achieve lower prices, a usually desirable goal, is excused from basic antitrust principles. If so, then the antitrust laws would favor buyers over sellers, and no longer encourage the "give and take" of the marketplace. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986). Sellers would be deprived of the antitrust protection which is afforded to buyers.

Determining the extent to which the same antitrust proscriptions apply to buyers and sellers is important not only to buyers who may engage or consider participating in joint buying conduct. It is of equal importance to the seller, like Sewell, who may have to confront it. In fact, this case illustrates exactly why the antitrust rules for joint buying conduct should be clearly defined.

Making and selling plastic beverage bottles for soft drink bottlers is the lifeblood of Sewell's business, and has been since inception of the business over 13 years ago. Sewell sells to bottlers throughout the country, which means Coca-Cola and Pepsi bottlers are critical to its business.

If the Southeastern-type arrangement is judicially condoned, then Sewell (and other independent suppliers) face the risk that concentrated groups of Pepsi and Coca-Cola bottlers can set up the same arrangement, removing *en masse* a large group of customers in a given area. In areas where *both* Pepsi and Coca-Cola bottlers would do so, an independent supplier could not conceivably survive, as the remaining bottlers of the lesser known soft drink brands hardly have sufficient business to support bottle-making plants. There would be nothing to stop Pepsi and Coca-Cola bottler groups from systematically imple-

menting such arrangements to eliminate independent suppliers throughout the country (and as an additional significant consequence—which would be an incentive for the two soft drink giants—bottlers of lesser known brands would have nowhere to turn for bottles).

On summary judgment, Sewell submitted an affidavit from the former head of another independent supplier relating how that supplier determined to get out of the business because he was told by a senior Coca-Cola executive that it intended to promote and implement the strategy of so-called "self-manufacture" by its bottlers through arrangements like the one in issue. (Record 2058-65.)[10]

Sewell and the remaining independent suppliers need to know if they face the risk of being excluded from soliciting the business of concentrated groups of bottlers of the two soft drink giants.

Even if no further exclusionary buying arrangements would be established, the rules of competition in any event should be firmly defined. There already exist eleven cooperatives of one kind or another in the Coca-Cola system, including three which make plastic bottles. (Record 1871.) In the relevant area here, Pepsi bottlers have their cooperative, "Carolina Canners," *supra* at n.3, but it has operated *without* the advantages enjoyed by Southeastern under its captive arrangement. Independent suppliers can and do compete against Carolina Canners for the business of Pepsi bottlers; no one can compete for the business of the Coca-Cola bottlers.

The rules of competition should be the same for all competitors, "cooperatives" and others alike. This Court

---

[10] This supplier was not alone in deciding to get out of the business. Similar reasons prompted a second supplier to do the same, as also reflected in an affidavit submitted on summary judgment. (Record 1952-58.)

has so held, *even* when considering the conduct of a cooperative formed under special Congressional legislation; being a "cooperative" is not license to engage in business practices, unavailable to independent firms, which do not promote competition but rather discourage or eliminate it. *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960).

* * *

We turn now to what we respectfully submit are the key issues which this Court should address in considering the antitrust rules for joint buying conduct, whether such conduct occurs in the context of a "cooperative" or otherwise.

I. THIS COURT SHOULD CONSIDER AND INSTRUCT WHETHER TRADITIONAL PER SE PRINCIPLES APPLY TO A JOINT BUYING AGREEMENT HAVING PRICE-FIXING AND BOYCOTT ELEMENTS.

The *per se* rules for joint seller conduct were unmistakably reaffirmed this year in *FTC v. Superior Court Trial Lawyers Association*, 110 S. Ct. 768 (January 22, 1990), and in *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (November 26, 1990). In light of the Fourth Circuit's determination here that the same principles do *not* apply to joint buyer conduct, it is appropriate and important for this Court to instruct whether that is the case.

More than two dozen bottlers agreed that each would deal almost exclusively with Southeastern and pay the price determined by its board of directors. On their face, these are price-fixing and boycott elements which deny other suppliers "access" to the bottlers as potential customers. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294-95 (1985). Sewell's *per se* claims were dismissed as a matter of law on stated grounds which are incorrect, and should be corrected by this Court to assure that *per se* principles are even-handedly applied to buyers and sellers.

A. The "Substantial Competitor" Defense Does Not and Should Not Exist, for the Effect of Joint Buyer Price-Fixing and Boycott Conduct Is the *Same* on *Sellers Regardless* of Whether the Buyers are "Substantial Competitors" on the Selling Side.

Respondents successfully argued to the courts below that *per se* principles were inapplicable to their agreement because they were not "substantial competitors" of each other in selling soft drinks to their customers.[11] The courts below found persuasive reasoning that, because they were not substantial competitors of each other, their agreement posed little or no risk to *inter*brand competition between them and other competing soft drink bottlers.

First, the fact that the bottlers do not compete as sellers, does not alter their status as competitors in the *purchase* of goods. *Nothing in the antitrust laws excludes competition in the purchase of goods in defining proscribed conduct.* In its first summary judgment opinion, the district court even acknowledged that the bottlers were competing *purchasers.* (App. 82a, 88a.)

This Court has not imposed a "substantial competitor" requirement, and the absence of any such determination or analysis in its *per se* rulings suggests otherwise. For example, in *FTC v. Superior Court Trial Lawyers As-*

---

[11] They admitted that there was competition in some limited respects, such as in filling soft drinks for bottlers of certain other brands. (App. 88a.)

As indicated earlier herein, their status as non-competitors derives from the exclusivity of their Coca-Cola territorial franchise, which is enforceable under the Soft Drink Interbrand Competition Act of 1980. Notably, however, the Act expressly limits the antitrust exemption to the enforceability of those agreements, specifically reaffirming that the antitrust laws otherwise apply to all other conduct.

Sewell submits that, by its express terms, the Act cannot be read to permit concerted conduct which would be unlawful *but for* the bottlers' status as "non-competitors" authorized by legislation which, by its terms, is limited to enforcing the exclusive territorial franchise agreement.

sociation, 110 S. Ct. 768 (January 22, 1990), there is no "substantial competitor" relationship among the conspiring trial lawyers.

Second, with due recognition of the antitrust emphasis on *inter*brand competition, the lower courts' refusal to apply *per se* treatment because interbrand competition *among soft drink bottlers of different brands* was not likely affected looks in the wrong direction: It is interbrand competition *among plastic bottle manufacturers* that is directly and intentionally lessened or eliminated. In focusing on the effects at the bottler retail level, the lower courts here disregard the teaching of *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609-10 (1972):

> Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.

The *Topco* decision was recently cited with approval in *Palmer, supra.*

To impose an elusive "substantial competitor" requirement would lead to unpredictable and inconsistent treatments of *per se* principles to concerted conduct which has the same intent and effect: In this case, the effect on Sewell and other independent suppliers is the same *regardless* of the degree of retail competition among defendant bottlers; whether competition at the seller level is unreasonably restrained or substantially lessened *has nothing to do with* the buyers' relationship as retail competitors *vel non* of each other.

B. This Court Should Consider and Instruct Whether the "Ancillary Restraint Doctrine" Excuses a Joint Buying Agreement from *Per Se* Treatment (or Makes It Reasonable, as a Matter of Law, Under the Rule of Reason) Where Its Purpose and Effect Is to Insulate the Buyers' Separate Joint Venture *From* Competition.

Restraints which are necessary to the legitimate objectives of a joint venture are not considered "unreasonable"

for Sherman Act § 1 purposes. *E.g., Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 22 (1979).

In its first summary judgment opinion and in subsequently holding the joint buying agreement reasonable as a matter of law, the district court (approved by the Fourth Circuit) accepted respondents' stated "justification" for the price-fixing and boycott elements of the agreement—namely, that those were necessary to form and successfully operate Southeastern. The district court reasoned that some minimum volume requirement was necessary to establish a viable bottlemaking facility, and so requirements contracts intended to assure such a volume were reasonable. (App. 36a.) The district court further reasoned that the price-fixing and boycott elements also served to preclude other suppliers from "cherry-picking" its bottlers through selective lower price offers. (App. 39a, 92a-93a.) In short, the provisions helped guarantee the "success" of Southeastern.

This holding confuses restraints necessary to the business of the venture itself, with restraints convenient or desirable to give the venture a commercial advantage in the market. The narrow exception for acceptable restraints was suggested by this Court in *Broadcast Music*, 441 U.S. at 23:

> Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, *where the agreement or price is necessary to market the product at all.* (emphasis added.)

Restraints which are designed to prevent independent suppliers from attempting to solicit the business of individual participants, and which thereby insulate the joint venture from competition, are not necessary to "market the product at all." In this case, the joint buying agreement was no more necessary to the making and selling of plastic bottles by Southeastern, than any joint buying agreement with other groups of bottlers is nec-

essary to the making and selling of plastic bottles by any independent supplier. It simply is not.

Of course, a manufacturer may properly determine to negotiate and enter into a contract with a customer. That is a common practice in any business where buyers regularly purchase from the same sellers. However, individual buyer-seller relationships are not at issue; a *horizontal* arrangement among buyers to assure that none of the group is vulnerable to a competing supplier's solicitation *is* in issue.

With all respect, the lower courts thus have confused both necessary and convenient restraints, as well as the distinction between individual buyer-seller relationships and concerted buyer conduct. Indeed, the bottlers' standard supply contract recites that Southeastern needed to be "assured of a ready market" in order to succeed. (Record 5635.) "Success" achieved by "assuring" a captive market is not "success" protected by the antitrust laws.

The rulings here, if permitted to stand, would turn the idea of competition on its head, and encourage anti-competitive horizontal restraints because they happen to make it easier for the participants to achieve "success" not *through* competition, but from the *absence* of it.

II. THIS COURT SHOULD CONSIDER AND INSTRUCT WHETHER, IN A JOINT BUYER CASE, LOWER PRICES REPRESENT PRO-COMPETITIVE OR ANTI-COMPETITIVE EFFECTS.

Equally in issue is what meaning should be given to lower prices in a concerted buyer case. The lower courts' determination that such effects are pro-competitive underlie all of the rationale for dismissal of Sewell's claims.

The lower courts have misapprehended this Court's enunciation of the standard for anti-competitive effects by inappropriately relying on cases which dealt with seller conduct. *E.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984). (App. 90a-91a.)

It certainly would be anomalous to condemn classic buyer price-fixing intended to drive prices down as *per se* unlawful—*e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948)—but should *per se* treatment be held inapplicable, then find the very same objective or effect to be *pro*-competitive under the Rule of Reason. Indeed, to find lower prices to be *necessarily pro-competitive*—as happened here—would be to excuse virtually all joint buyer conduct from Rule of Reason application.

If it is the interpretation of this Court that Sherman Act § 1 and Clayton Act § 3 proscriptions should not apply to joint buyer conduct which has the intent or effect of lowering prices, then we urge that this Court do so directly, and not through lower courts' interpretation of this Court's pronouncements in concerted seller cases.

This Court, however, should conclude and pronounce that, just as higher prices represent anti-competitive effects in seller cases, lower prices represent anti-competitive effects in joint buyer cases. This is the *only* result which would maintain even-handed application of the antitrust laws to buyers and sellers. If buyers are allowed to do for themselves what sellers cannot, the competitive balance would be unfairly tipped in buyers' favor and the antitrust laws unevenly applied.

III. THIS COURT SHOULD CONSIDER AND INSTRUCT ON THE MARKET POWER REQUIREMENT FOR PER SE AND RULE OF REASON PURPOSES.

In *FTC v. Superior Court Trial Lawyers Association*, 110 S. Ct. 768 (January 22, 1990), the majority of this Court indicated that market power was not a prerequisite for *per se* condemnation of a seller boycott, but that in any event—without any complex economic analysis—the conspiring trial lawyers' group possessed whatever market power arguably could be required. Nor did this Court in *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401

(November 26, 1990), require or refer to "market power" in holding unlawful a sellers' market division agreement.

In dismissing Sewell's *per se* claims, the district court implied that the respondents did not possess a sufficiently dominant market position which frequently exists when *per se* violations occur. In dismissing Sewell's remaining claims, the district court expressly found that Sewell had failed even to raise an issue of market power. Despite acknowledged evidence that the bottler group represented nearly 40% of the buying market and had a contractual *right* to set the price which each of the 33 bottlers must pay, the district court held that there was "no evidence" of the group's power to raise or depress prices beyond competitive levels. (App. 45a-49a, 58a.)

The rulings here are at odds with this Court's approach to the question of market power. If the magnitude of the trial lawyers' combined economic power in *Trial Lawyers* was sufficient to apply *per se* treatment without detailed and costly economic analysis, the bottlers' power is equally obvious, at a minimum, to have precluded summary judgment dismissal under the Rule of Reason. *Palmer* suggests no such requirement exists at all for *per se* treatment.

This Court should instruct whether *per se* or Rule of Reason treatment of joint *buying* conduct requires a market power showing. As this case demonstrates, "market power" appears to be an elusive standard which creates a likelihood that the antitrust laws will be unevenly applied because of differing conclusions likely to be reached on the same basic facts and circumstances. Surely, if a near-40% market share, coupled with the express power to control price, are insufficient *even to raise a triable issue*, it becomes difficult to discern what would be sufficient. Buyers and sellers are entitled to know, and the Fourth Circuit's adherence to the district court's decision is both wrong and unenlightening on the market power standard.

IV. THIS COURT SHOULD CONSIDER AND INSTRUCT WHETHER A SELLER SUFFERS "ANTITRUST INJURY" WHERE IT HAS LOST PROFITS BY VIRTUE OF AN AGREEMENT AMONG FORMER CUSTOMERS WHICH EXCLUDES THE SELLER FROM COMPETING FOR INDIVIDUAL CUSTOMERS' BUSINESS.

Consistent with the theme that concerted buyer conduct which is intended to achieve lower prices is procompetitive, the district court (approved by the Fourth Circuit) held that Sewell suffered no antitrust injury within the meaning of Clayton Act § 4, because Sewell was really complaining about Southeastern's "presence" as a competitor in the market. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

By holding that no antitrust injury occurred here, the Fourth Circuit has announced an additional basis for excusing conduct from both *per se* and Rule of Reason application. This holding means that no seller may bring a private antitrust action against a group of buyers who have targeted the seller for boycott. It similarly means that no seller may bring an action for concerted price-fixing activities by a group of buyers, for those activities, too, would be deemed "pro-competitive" in the intent and effect of achieving lower prices and, accordingly, the seller would not suffer "antitrust injury."

In this way, too, the antitrust proscriptions have been eliminated for concerted buyer conduct. It is difficult to conceive of a situation where, under this holding, a seller may maintain an action against buyers under Sherman Act § 1 or Clayton Act § 3.

In considering the extent to which those provisions still apply to joint buyer conduct, this Court should reconfirm that sellers do indeed suffer antitrust injury when they

lose sales (and profits) which they otherwise would have enjoyed if they had been able to compete.[12]

V. THIS COURT SHOULD CONSIDER AND INSTRUCT WHETHER RULE 56 AUTHORIZES SUMMARY JUDGMENT DISMISSAL BASED ON THE DISTRICT COURT'S OWN DETERMINATION THAT THE PRO-COMPETITIVE BENEFITS OF CONCERTED CONDUCT—CONTAINING PRICE-FIXING AND BOYCOTT ELEMENTS—OUTWEIGH ANTICOMPETITIVE EFFECTS.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court articulated the requirements for an evidentiary inference of conspiracy in an antitrust case, an element obviously not in issue in this case.

Instead, however, for purposes of this case the district court (approved by the Fourth Circuit) has interpreted *Matsushita* to authorize it to weigh the evidence on summary judgment, thereby making fact findings such as, for example:

—that the contractual provisions in issue were "reasonable" to achieve the "proper" objective of precluding independent suppliers from competing for the participating bottlers' business (App. 39a, 92a-93a);

—that the evidence that suppliers curtailed operations or determined to withdraw from the industry rep-

[12] The evidence in this case especially illustrates how Sewell lost profits directly as a result of the price-fixing and boycott elements of the agreement. In one instance, it offered a lower price to a former customer, who was unable to accept because of its membership in the group. (Record 1389-97, 1961, 5709-11.) In two other instances, former customers reconsidered whether to remain in the group and determined to do so only after the group's representatives advised them that they would have to pay a substantial financial assessment (significantly more than any lost profits) if they withdrew. Both remained. (Record 1961-62, 2488-93, 2511-14, 2529, 2966-71.)

We urge that the direct causal connection between the antitrust violations and Sewell's losses hardly could be more apparent.

resented merely injury to "competitors," as opposed to injury to "competition" (App. 44a, 56a-57a);

—that the acknowledged evidence of quality problems was insufficient to raise a triable issue of whether there was an "overall" deterioration in quality (App. 45a);

—that cutbacks in research and development by certain suppliers were insufficient to raise a triable issue of whether "overall" research and development declined (App. 44a); and

—that the joint agreement to buy 80% requirements from Southeastern was "reasonable" despite the acknowledged evidence that it far exceeded the minimal amount of volume necessary to establish a viable manufacturing facility. (App. 36a.)

We respectfully submit that the district court here improperly extended *Matsushita* as authority to weigh anti-competitive and pro-competitive effects. *Because every horizontal agreement with boycott or price-fixing elements is anti-competitive on its face, dismissal necessarily entails weighing its facially anti-competitive effects against its pro-competitive benefits—a function properly left to a jury* (if indeed it is not a *per se* violation in the first instance).

Therefore, the district court here (approved by the Fourth Circuit) necessarily engaged in precisely the kind of fact-finding process which is not permitted by Fed. R. Civ. P. 56, and represents an unfounded extension of *Matsushita* far beyond any expressed intention of this Court. The district court decided itself whether the challenged arrangement was good for society, when the fact issues should be determined by society's representatives on the jury.

CONCLUSION

If, as the district court initially held, *per se* treatment was inappropriate because the courts were unfamiliar with the arrangement in issue, it was equally inappropriate to

find, as a matter of law, that the arrangement was pro-competitive, reasonable and beneficial to society. The lower court rulings—substantively and procedurally—deprived Sewell of its right to a fair redress of its grievance, or at least a right to a jury determination on the merits of its grievance.

But those rulings also did much more: they effectively excused all concerted buyer conduct from *per se or* Rule of Reason application, and indeed go so far as to preclude a boycotted seller from even pursuing a case against buyers under the "antitrust injury" requirement of Clayton Act § 4. In the process, Rule 56 has been interpreted to authorize the district court to engage in its own complex fact-finding process.

This Petition should be granted to consider and instruct whether the rules of economic competition apply equally to buyers and sellers, and to further consider and instruct whether a *seller's* litigation rights in presenting a grievance against concerted buyer conduct are as protected under the antitrust laws and the Federal Rules of Civil Procedure as are a buyer's.

Respectfully submitted,

ROBERT L. HOEGLE, ESQ.
Counsel of Record
PETER ARON, ESQ.
OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10171
(212) 207-1800

WILLIAM L. RIKARD, ESQ.
PARKER, POE, THOMPSON, GAGE & PRESTON
2600 Charlotte Plaza
Charlotte, NC 28244
(704) 372-9000

December 31, 1990